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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

RFP LLC,

Plaintiff/
Counterclaim Defendant,

-against-

SCVNGR, INC.,

Defendant/
Counterclaim Plaintiff.

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10 Civ. 8159 (DLC)

SCVNGR, INC.,

Third-Party Plaintiff,

-against-

BARRY ROSENBLOOM,

Third-Party Defendant.

DEFENDANT / COUNTERCLAIM PLAINTIFF / THIRD-PARTY PLAINTIFF SCVNGR, INC.'S MEMORANDUM OF LAW IN OPPOSITION TO PLAINTIFF / COUNTERCLAIM DEFENDANT RFP LLC AND THIRD-PARTY DEFENDANT BARRY ROSENBLOOM'S MOTION TO DISMISS SCVNGR, INC.'S THIRD AND FOURTH COUNTERCLAIMS AND THIRD-PARTY COMPLAINT

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Defendant/Counterclaim Plaintiff/Third-Party Plaintiff SCVNGR, Inc. ("SCVNGR") respectfully submits this memorandum of law in opposition to Plaintiff/Counterclaim Defendant RFP LLC ("RFP") and Third-Party Defendant Barry Rosenbloom's ("Rosenbloom") (collectively, "Counter Defendants") Motion to Dismiss SCVNGR's Third and Fourth Counterclaims and Third-Party Complaint.

PRELIMINARY STATEMENT

This motion to dismiss is nothing more than Counter Defendants' attempt to avoid liability for unjustifiable aggression towards SCVNGR and one of SCVNGR's clients, Bremer Jewelry ("Bremer"), which has injured not only SCVNGR and Bremer, but the consuming public as a whole. Counter Defendants sent a cease-and-desist letter and made other communications containing false statements regarding Counter Defendants' trademark rights to Bremer, and, as a result, Bremer took the remarkable step of sending SCVNGR—Bremer's own business partner in advertising and promoting a scavenger hunt for an engagement ring—a cease-and-desist letter, parroting the false statements and demands of Counter Defendants the day after receiving Counter Defendants' letter and just two days before the scavenger hunt. Counter Defendants' motion to dismiss must be denied because (1) SCVNGR has alleged Counter Defendants made a misrepresentation to Bremer and communicated on one or more occasions with Bremer as part of its claims for tortious interference with a business relationship; and (2) SCVNGR has alleged Counter Defendants' deceptive acts and practices under New York General Business Law § 349 were consumer-oriented and harmed the public interest.

FACTUAL BACKGROUND

From 2003 to 2008, RFP held, sponsored, or licensed a scavenger hunt under the trademark RACE FOR THE ROCK on or around Valentine's Day, but has not held, sponsored, or licensed any such contests since at least March 2008. Declaration of Jonathan J. Ross in

Support of Motion to Dismiss ("J. Ross Dec.") Ex. 2 (Answer, Counterclaims, and Third-Party Complaint) at 13-14. Indeed, as RFP has admitted, RFP promoted the February 2008 event under the name "Sixth Annual Race for the Rock," but RFP did not hold a "Seventh Annual Race for the Rock." Doc. # 17 (Reply to Counterclaims) at 2; *see* J. Ross Dec. Ex. 2 at 13. RFP also admits that RFP did not hold, sponsor, or license a scavenger hunt on or around Valentine's Day in 2009 or 2010. Doc. # 17 at 2; *see* J. Ross Dec. at 13-14. The Counterclaims further allege that RFP discontinued use of the trademark RACE FOR THE ROCK after the 2008 contest and intended not to resume such use, and has not used the trademark RACE FOR THE ROCK in connection with the bona fide offering of any goods or services, and has not sold any goods or services under the trademark, since at least March 2008. J. Ross Dec. Ex. 2 at 14. Consumers, prospective consumers, and members of the public do not associate the trademark RACE FOR THE ROCK with RFP. *Id.* As a result of RFP's abandonment of any rights it may have in the trademark RACE FOR THE ROCK, SCVNGR is the senior owner of the mark and, as between the parties, is the senior user. *Id.* at 15.

Nevertheless, despite RFP having abandoned its trademark rights, RFP and its President, Rosenbloom, intentionally interfered with SCVNGR's business relationship with Bremer to provide services for scavenger hunt contests to win engagement rings. *Id.* at 15-16, 18. Counter Defendants did this by communicating with Bremer on one or more occasions, including through Rosenbloom and/or RFP's attorneys at Rosenbloom's direction. *Id.* at 16, 18-19. In one such instance, Counter Defendants sent a letter to Bremer on or around October 6, 2010 in which they falsely claimed RFP has valid trademark rights in the mark RACE FOR THE ROCK, falsely claimed that SCVNGR and Bremer have violated RFP's alleged trademark rights, and demanded that Bremer cease and desist from any further uses of the mark. *Id.* At the time of this letter, Counter Defendants knew that they had not used the RACE FOR THE ROCK mark in more than two and a half years. Counter Defendants' conduct was malicious, dishonest, unfair, and improper, and Counter Defendants' sole purpose was to harm SCVNGR. *Id.* at 16, 19. As a result of their deception, Bremer wrongly believed RFP was the owner of trademark rights in the mark RACE FOR THE ROCK, took the extraordinary step of sending its own cease and desist letter to SCVNGR which reiterated the false statement of Counter Defendants, and requested that SCVNGR remove the RACE FOR THE ROCK mark from all advertisements and promotions for the services SCVNGR was providing for Bremer. *Id.* at 16-17, 19. Consequently, the RACE FOR THE ROCK mark was not publicly used thereafter in connection with the race and the race was conducted under another name. Counter Defendants' conduct injured both SCVNGR's business relationship with Bremer and members of the public. *Id.* at 17, 20.

RFP filed a Complaint alleging, among other claims, that SCVNGR infringed RFP's trademark and also committed deceptive acts and practices in violation of § 349. SCVNGR thereafter filed counterclaims and a third-party complaint that include claims for tortious interference with a business relationship and deceptive acts and practices under § 349, the subjects of Counter Defendants' motion.[1]

ARGUMENT

I. STANDARD OF REVIEW

Under Federal Rule of Civil Procedure 12(b)(6), "[t]o survive a motion to dismiss, a plaintiff must 'plead enough facts to state a claim to relief that is plausible on its face.'" *Gucci*

[1] Counter Defendants have not moved to dismiss SCVNGR's counterclaims that assert RFP has abandoned the RACE FOR THE ROCK mark.

Am., Inc. v. Frontline Processing Corp., 721 F. Supp. 2d 228, 246 (S.D.N.Y. 2010) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). "A facially plausible claim is one where 'the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged.'" *Id.* (quoting *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1949 (2009)). The court should assume the veracity of well-pled factual allegations and determine whether they plausibly give rise to an entitlement to relief. *Id.* "In reviewing a complaint for dismissal under Rule 12(b)(6), the court must accept the material facts alleged in the complaint as true and construe all reasonable inferences in plaintiff's favor." *Gant v. Wallingford Bd. of Educ.*, 69 F.3d 669, 673 (2d Cir. 1995) (quotation omitted). "The issue is not whether a plaintiff is likely to prevail ultimately, but whether the claimant is entitled to offer evidence to support the claims." *Branham v. Meachum*, 77 F.3d 626, 628 (2d Cir. 1996) (quotation omitted).

II. SCVNGR HAS PROPERLY PLED TORTIOUS INTERFERENCE WITH A BUSINESS RELATIONSHIP CLAIMS AGAINST RFP AND ROSENBLOOM BECAUSE SCVNGR ALLEGES A MISREPRESENTATION WHICH CONSTITUTES "IMPROPER MEANS"

SCVNGR has alleged that Counter Defendants misrepresented their trademark rights in their letter to Bremer, and this misrepresentation alone is sufficient to constitute "improper means" to support SCVNGR's tortious interference claims.[2] Counter Defendants' false statement to Bremer that it has rights in the mark RACE FOR THE ROCK clearly constitutes a misrepresentation, as RFP had abandoned any rights it may have had nearly three years before. Moreover, the fact that Bremer took the extremely unusual action of sending its own partner a demand letter on October 7, 2010—the day after Bremer received Counter Defendants' letter and just two days before the event in which the mark was to be used—suggests that the additional improper communications by Counter Defendants to Bremer that SCVNGR alleges occurred as well. *See* J. Ross Dec. Ex. 2 at 16, 18-19; *see also id.* at Ex. 1 at 6 (Bloomington, Illinois contest held on October 9, 2010); *id.* Ex. 1 at Ex. 4 (letter from C. Daily to S. Anderson dated October 7, 2010).

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[2] Counter Defendants spend over nine pages arguing for dismissal of claims for tortious interference with contract, but as is clear from the Answer, Counterclaims, and Third-Party Complaint, SCVNGR does not allege such claims. *See* J. Ross Dec. Ex. 2.

The elements of a tortious interference with a business relationship claim are "the defendant's interference with business relations existing between the plaintiff and a third party, either with the sole purpose of harming the plaintiff or by means that are dishonest, unfair or in any other way improper." *Martin Ice Cream v. Chipwich, Inc.*, 554 F. Supp. 933, 945 (S.D.N.Y. 1983) (quotation omitted).[3] To state a claim against a competitor, "the alleged tortfeasor must employ 'wrongful means.' The definition of "wrongful means" under New York law includes physical violence, fraud or misrepresentation, civil suits and criminal prosecutions, and some degrees of economic pressure." *Hannex Corp. v. GMI, Inc.*, 547 F.3d 115, 206 (2d Cir. 1998) (emphasis added) (citations omitted). Further, language limiting "wrongful means" to the categories of criminal or fraudulent conduct "would appear unduly narrow."[4] *Id.* at 206 n.9. "[W]here a suit is based on interference with a nonbinding relationship, the plaintiff must show that defendant's conduct was not 'lawful' but 'more culpable.'" *Carvel Corp. v. Noonan*, 3

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[3] "This type of tort has been variously referred to as interference with either economic advantage, prospective advantage, business relations, or pre-contractual relations. Whatever the most apt rubric may be, the elements of the tort are the same . . . ." *Martin Ice Cream*, 554 F. Supp. at 945.

[4] Indeed, Counter Defendants acknowledge that SCVNGR need not show a crime or independent tort if Counter Defendants engaged in conduct with the sole purpose of harming SCVNGR or employed wrongful means. *See* Motion to Dismiss Memorandum at 14-15.

N.Y.3d 182, 190, 818 N.E.2d 1100, 1103 (N.Y. 2004). Conduct that is "more culpable" includes a misrepresentation. *See Jim Mazz Auto, Inc. v. Progressive Cas. Ins. Co.*, C.A. Nos. 08-CV-00494(A)(M), 08-CV-00541(A)(M), 08-CV-00566(A)(M), 08-CV-00583(A)(M), 2009 U.S. Dist. LEXIS 31945, *24-*25 (W.D.N.Y. Feb. 5, 2009) (unpublished).[5]

In this case, SCVNGR has expressly alleged that Counter Defendants have made a misrepresentation which is sufficient to state a claim for tortious interference with a business relationship under *Carvel*.[6] The district court in *Jim Mazz Auto* analyzed the sufficiency of a misrepresentation in detail. In *Jim Mazz Auto*, the plaintiff automobile collision repair shop sued several insurance companies for tortious interference with prospective economic advantage, alleging that the insurance companies urged their insureds to have repairs done at facilities of the insurance companies' choosing—without the insureds having requested such suggestions—and that the insurance companies specifically discouraged the insureds from having repairs done at the plaintiff's facility. *Id.* at *3. The court determined that plaintiff's allegations that the insurance companies made misrepresentations to their insureds alone were sufficient to withstand a motion to dismiss, concluding, under *Carvel*, that a cause of action should be sustained if plaintiff alleges a misrepresentation. *Id.* at *24.

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[5] Counter Defendants' reliance on *A & A Jewellers Ltd. v. Bogarz, Inc.*, C.A. No. 05-0020E(SC), 2005 WL 2175164 (W.D.N.Y. Sept. 7, 2005) (unpublished), is misplaced because SCVNGR has alleged Counter Defendants made a misrepresentation. The court in that case analyzed whether the defendant's communication could constitute "wrongful economic pressure," *see id.* at *2, not whether the defendant's communication could constitute a misrepresentation. Moreover, the *A & A Jewellers* court concluded the defendant could not have acted with the sole purpose of harming the plaintiff partly because of the litigation history between the parties. *See id.* Here, there is no such history.

[6] Further, even though SCVNGR is not required to plead an independent tort, by Counter Defendants' own definition, *see* Motion to Dismiss Memorandum at 13, SCVNGR has pled the elements of fraud. SCVNGR has alleged: (1) a misrepresentation of fact which was false, (2) that Counter Defendants knew the misrepresentation was false because RFP abandoned the mark without an intent to resume use, (3) that the misrepresentation was made for the purpose of inducing Bremer to rely upon it, (4) justifiable reliance of Bremer on the misrepresentation, and (5) injury. *See* J. Ross Dec. Ex. 2 (Counterclaims and Third-Party Complaint).

SCVNGR undoubtedly has alleged Counter Defendants made a misrepresentation to Bremer, and for that reason alone SCVNGR's tortious interference claims should not be dismissed. However, even if this Court determines that only certain types of misrepresentations are "more culpable," *see Friedman v. Coldwater Creek, Inc.*, C.A. No. 08-0979, 321 F. App'x 58, 60 (2d Cir. April 8, 2009) (unpublished), SCVNGR's allegations satisfy this more stringent standard. In *Carvel*, the New York Court of Appeals strongly suggested that a misrepresentation to plaintiff's customers that drove them away from plaintiff would constitute "wrongful means." 3 N.Y.3d at 192, 818 N.E.2d at 1104; *see Jim Mazz Auto*, 2009 U.S. Dist. 31945, *23-24. Here, SCVNGR alleges that Counter Defendants' misrepresentation essentially did just that by inducing Bremer to request that SCVNGR remove the mark from advertisements and promotions. *See* J. Ross Dec. Ex. 2 at 16-17, 19. Accordingly, Counter Defendants' misrepresentation of trademark rights constitutes "wrongful means" under *Carvel*, 3 N.Y.3d at 192, 818 N.E.2d at 1104, and SCVNGR's tortious interference claims may not be dismissed.

Further, SCVNGR's claim is not based solely on the misrepresentation contained in Counter Defendants' letter to Bremer. Based on the drastic reaction of Bremer, which includes sending its own demand letter to SCVNGR parroting Counter Defendants' allegations, it is highly likely that additional communications between Bremer and Counter Defendants occurred as well and that these communications were improper. The only reasonable inference from SCVNGR's factual allegations is that these additional communications were made with the "sole purpose of harming SCVNGR, rise[] to the level of malice, and/or constitute[] dishonest, unfair, or improper means to interfere with SCVNGR's business relationship with Bremer." J. Ross. Dec. Ex. 2 at 16, 19; *see Martin Ice Cream*, 554 F. Supp. at 945. Counter Defendants' assertion that SCVNGR has not properly pled these elements simply is wrong. *See Gucci*, 721 F. Supp. 2d at 246 ("A facially plausible claim is one where 'the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged.'") (quoting *Ashcroft*, 129 S. Ct. at 1949).

III. SCVNGR'S CLAIMS FOR DECEPTIVE ACTS AND PRACTICES UNDER NEW YORK GENERAL BUSINESS LAW § 349 AGAINST RFP AND ROSENBLOOM ARE WELL PLED

A. SCVNGR As A Business May Bring Claims Under § 349 Against RFP And Rosenbloom

Counter Defendants' argument that SCVNGR's § 349 claims should be dismissed because Counter Defendants' conduct is between businesses is without merit. The Second Circuit clearly has stated that:

> a plaintiff need neither be a consumer nor be someone standing in the shoes of a consumer to have an actionable claim under Section 349. Accordingly, this court has allowed a corporation to use Section 349 to halt a competitor's deceptive consumer practices. . . . [A] party has standing under Section 349 when its complaint alleges a consumer injury or harm to the public interest.

Blue Cross & Blue Shield of N.J., Inc. v. Philip Morris USA Inc., 344 F.3d 211, 218 (2d Cir. 2003) (quotation and internal citations omitted). Here, SCVNGR has alleged RFP's and Rosenbloom's conduct has harmed the public interest, *see* J. Ross Dec. Ex. 2 at 17, 20, and therefore its claims under § 349 should not be dismissed. Counter Defendants have made this argument even though RFP's own § 349 claim against SCVNGR alleges a dispute between businesses, *see id.* Ex. 1 at 15, a further indication that Counter Defendants' contention that such claims are "not encompassed within section 349" is meritless, Motion to Dismiss Memorandum at 20 (quotation omitted).

B. SCVNGR Alleges RFP's And Rosenbloom's Conduct Is "Consumer-Oriented" And Caused Injury To The Public

Although RFP itself has alleged confusion of the public to support its own § 349 claim, *see* J. Ross Dec. Ex. 1 at 15, Counter Defendants assert in their motion to dismiss that their allegedly deceptive conduct is not "consumer-oriented," Motion to Dismiss Memorandum at 19, and that "consumer confusion . . . is insufficient injury to sustain a claim under § 349," *see id.* at 22. Counter Defendants cannot have it both ways. In any event, Counter Defendants' deceptive conduct is consumer-oriented because it affected Bremer's scavenger hunt which was intended for members of the public. As a result of Counter Defendants' wrongful conduct, SCVNGR was forced to remove the RACE FOR THE ROCK mark from advertisements and promotions for the services SCVNGR was providing for Bremer just days before the event. J. Ross Dec. Ex. 2 at 17, 19-20. The reasonable inference, which must be construed in SCVNGR's favor for the purposes of this motion, is that the use of a different mark, particularly at the last minute, may have affected the public's perception of and participation in the event.

As the court in *New York v. Feldman* concluded, "[t]o state a claim under section 349, a plaintiff must allege, among other things, that defendants engaged in a consumer-oriented act. This requirement, however, has been construed liberally. A defendant engages in 'consumer-oriented' activity if his actions cause any consumer injury or harm to the public interest." 210 F. Supp. 2d 294, 301 (S.D.N.Y. 2002) (quotations and citations omitted) (emphasis added). Moreover, "[c]onsumer-oriented conduct does not require a repetition or pattern of deceptive behavior." *Oswego Laborers' Local 214 Pension Fund v. Marine Midland Bank, N.A.*, 85 N.Y.2d 20, 25, 647 N.E.2d 741, 744 (N.Y. 1995).[7]

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[7] Counter Defendants' reliance on *P. Kaufmann, Inc. v. Americraft Fabrics, Inc.*, 232 F. Supp. 2d 220 (S.D.N.Y. 2002), is misplaced. *P. Kaufmann* erroneously holds that any widespread

Without a doubt, SCVNGR has alleged harm to the public because SCVNGR was forced to remove the RACE FOR THE ROCK mark from advertisements and promotions for Bremer's contest due to Counter Defendants' deception just days before the event, potentially affecting the consuming public's perception of and participation in Bremer's contest. *See* J. Ross Dec. Ex. 2 at 17, 20. This allegation is more than enough for SCVNGR to state § 349 claims against Counter Defendants. *See Feldman*, 210 F. Supp. 2d at 301; *see also Macquarie*, 2009 U.S. Dist. LEXIS 16554, *24 (discussing *Feldman* and holding plaintiffs alleged "consumer-oriented" conduct under § 349 when "plaintiffs allege[d] defendant orchestrated a refusal to deal designed to prevent its entry into the market, thereby, allowing defendant to charge supracompetitive prices. This undermines New York's interest in an honest marketplace in which economic activity is conducted in a competitive manner.").

CONCLUSION

For the foregoing reasons, SCVNGR respectfully requests that Counter Defendants' motion to dismiss be denied in its entirety.

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detriment alleged under § 349 must occur to those who were misled by the deceptive conduct. *See id.* at 226. Another court in the Southern District of New York, however, has concluded that the consumer-oriented conduct requirement is satisfied if a defendant's actions "cause any consumer injury or harm to the public interest." *Feldman*, 210 F. Supp. 2d at 301 (quotation omitted) (emphasis added). Needless to say, because this requirement has been interpreted "liberally," *Feldman*'s construction should apply here. *Id.*; *see Macquarie Group Ltd. v. Pac. Corporate Group, LLC*, C.A. No. 08-2113, 2009 U.S. Dist. LEXIS 16554, *24 (S.D. Ca. March 2, 2009) (unpublished).

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Dated: January 27, 2011

CERTIFICATE OF SERVICE

I hereby certify that on January 27, 2011, Defendant/Counterclaim Plaintiff/Third-Party Plaintiff SCVNGR, Inc.'s Memorandum of Law in Opposition to Plaintiff/Counterclaim Defendant RFP LLC and Third-Party Defendant Barry Rosenbloom's Motion to Dismiss SCVNGR, Inc.'s Third and Fourth Counterclaims and Third-Party Complaint was filed with the Clerk of the Court via ECF and served in accordance with the Southern District's Rules on Electronic Service upon the following:

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